In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-229

ROBERT D. POMMERENING AND
CLETUS A. REDING, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their grand jury testimony and other prior statements and documents furnished by them to the F.B.I. were improperly admitted at their trial and that the indictment was inadequate to support their bribery convictions.

After a jury trial in the United States District Court for the District of New Mexico, petitioners were convicted on one count of bribery of a government official, in violation of 18 U.S.C. 201(b)(1), and one count of false declarations before a grand jury, in violation of 18 U.S.C. 1623(a). In addition, petitioner Pommerening was convicted on three counts of using false business records before the grand jury in violation of 18 U.S.C. 1623(a). Each petitioner was sentenced to concurrent terms of five years' imprisonment on each count. Each petitioner was also ordered to pay one-half the costs of prosecution. The court of appeals affirmed (500 F. 2d 92; Pet. App. 1-14).

The facts, which are detailed in the opinion of the court of appeals (Pet. App. 2-4), show that in the fall of 1971 petitioners desired to purchase an automobile dealership. They thereupon began looking for a bank that would make them a Small Business Administration guaranteed loan. However, petitioners soon experienced difficulties in obtaining Small Business Administration approval of their loan application.

Moses L. Sanchez, the minority enterprise representative for the Small Business Administration, discussed the matter with petitioners, and also indicated that he was thinking of buying a new Chevrolet and was wondering what type of trade-in he could expect on the car he presently owned. A short time later, petitioners delivered a new Chevrolet to Sanchez. Sanchez paid no money for it. Sanchez thereupon asked the district director of the Small Business Administration for approval of their loan application.

Moses Sanchez subsequently resigned from the Small Business Administration following the commencement of a bribery investigation by the United States Attorney. Thereafter, F.B.I. Special Agent Frank Haines visited petitioners' dealership in an attempt to trace the Chevrolet that petitioners had given to Sanchez. Petitioners prepared a falsified invoice and gave it to Haines. Haines subsequently received from petitioner Pommerening other documents that had been falsified under his direction.

On November 20, 1972, petitioners appeared before the grand jury with their subpoenaed books and records containing the false documents previously furnished to the F.B.I. Both petitioners testified falsely before the grand jury.

On January 17, 1973, a new subpoena was served on petitioners. That night, arson arranged by petitioners resulted in a fire at petitioners' dealership; it was put out before any records were damaged. On January 21, 1973, petitioner Pommerening arrived in Albuquerque with the subpoenaed records in a corporate automobile. That night, the automobile containing the records was stolen from the basement of an Albuquerque motel, and the records were never produced for the grand jury pursuant to the subpoena.[1] The bookkeeper at petitioners' dealership testified that petitioner Pommerening had arranged to have the records stolen and destroyed.

1. Petitioners' principal contention is that it was error to admit at trial their grand jury testimony on which the bribery and perjury convictions were based, since they were not given *Miranda* warnings prior to testifying before the grand jury. They contend that they were entitled to *Miranda* warnings because they were "putative defendants" on whom the government's investigation had already focused when they testified before the grand jury.

As the court of appeals observed, however, petitioners could not be characterized as "putative defendants," since Sanchez was the only person being investigated when the grand jury was convened, and "[t]he U.S. attorney felt appellants could give the grand jury information which would be useful in making a case against Sanchez" (Pet. App. 8). The court concluded, therefore,

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[1] The genuine records and the original false records were never recovered, although the "stolen" automobile was located. The government used copies previously obtained by the F.B.I. to prove its case.

that "the government had no duty to warn [petitioners] of their constitutional rights in absence of any indication that it might bring charges against them" (*ibid.*).

Alternatively, the court held that petitioners would not have been entitled to *Miranda* warnings even had the investigation focused upon them because "appellants were not under duress or compulsion which might constitute custodial interrogation * * * " (Pet. App. 9). We believe this view to be correct. Moreover, even if some warning were required, failure to provide petitioners with an adequate warning would not bar their prosecution for false testimony before the grand jury. As the court of appeals stated, "[t]he law is well settled * * * that * * * failure to give the warning does not entitle them to commit perjury. Our legal system provides other methods for challenging the government's right to ask questions" (Pet. App. 9). See also *Bryson* v. *United States*, 396 U.S. 64.

We agree with petitioners that the circuits are in conflict upon the issue of whether testimony given by a "putative defendant" before a grand jury without adequate prior warning must be suppressed in a subsequent prosecution for perjury, and upon the underlying issue of whether a so-called "putative defendant" is entitled to a warning of his Fifth Amendment rights prior to testifying before a grand jury. See *United States* v. *Manduja-no*, 496 F. 2d 1050 (C.A. 5); *United States* v. *Luxenberg*, 374 F. 2d 241 (C.A. 6); and *Stanley* v. *United States*, 245 F. 2d 427, 434 (C.A. 6), which support petitioners' position, and *United States* v. *Winter*, 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955; *United States* v. *DiGiovanni*, 397 F. 2d 409, 412 (C.A. 7), certiorari denied, 393 U.S. 924; *United States* v. *Nickels*, 502 F. 2d

1173 (C.A. 7), all of which support the government's position. These issues are presented in our petition for a writ of certiorari in *United States* v. *Rose Wong*, No. 74-634, and will also be presented in a petition in *Mandujano, supra.*[2] However, because the court in the instant case found that petitioners were not "putative defendants," it need not have reached these issues, and its judgment would not be affected by the manner in which this Court may ultimately resolve the conflict. The conflict on these issues, therfore, affords no occasion for review by this Court in this case.

The decision of the court of appeals in the instant case also involves the potentially difficult and important question, not directly addressed in *Rose Wong* or *Mandujano*, of how a "putative defendant" is to be identified—assuming such status requires special treatment. The district courts in both *Rose Wong* and *Mandujano* determined that the witnesses were "putative defendants" because the government already possessed evidence, at the time it called them to testify, sufficient to justify their prosecution for crimes of the kind that the grand jury was investigating. In the instant case, however, the court determined that petitioners were not "putative defendants" because they were not being investigated when the grand jury was convened. Petitioners maintain that, because they had only recently obtained a loan guaranteed by the Small Business Administration, "they were nearly automatically put in the limited class of people who could recently have had an occasion to bribe Moses L. Sanchez" (Pet. 8). The government therefore had *some* evidence against them (albeit marginally probative), and to this

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[2] The Solicitor General has authorized the filing of a petition for a writ of certiorari in *Mandujano*. On November 12, 1974, Mr. Justice Powell extended the time for the United States to petition to and including December 15, 1974.

extent, it is argued, the investigation had focused upon them when they were subpoenaed to appear before the grand jury. Although the government denied that it was seeking an indictment against petitioners when it called them to testify, the government issued a similar denial in *Mandujano*.

We submit that the court blow was correct in its determination that—whatever the outlines of the concept—petitioners were not "putative defendants." The instant case is distinguishable in this respect from *Rose Wong* and *Mandujano*, where the government had sufficient evidence against the witnesses to indict them prior to their testimony before the grand jury. There is thus no reason to suppose that witnesses similarly situated to petitioners would be deemed "putative defendants" by either the Fifth or the Ninth Circuits. Thus, without demeaning the potential importance and subtlety of the problem of defining who is a "putative defendant" should this Court ultimately hold that special warnings are required to be given such persons prior to their testimony before a grand jury, this would not be an appropriate case for resolving the issue.[3]

2. Petitioners contend that they should have been given *Miranda* warnings prior to answering certain questions and furnishing certain documents to the F.B.I. Pursuant to his investigation into the bribery activities of Sanchez, Special Agent Haines sought information from petitioners about the new Chevrolet that Sanchez was driving. Petitioners responded to Haines' request to look at the sale documents by supplying him with a false invoice reflecting a sale to "A. Jenkins." Petitioners also told Haines that the Chevrolet had been ordered by

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[3]Both *Rose Wong* and *Mandujano* leave uncertain the extent to which an investigation may proceed against a witness before he will be deemd a "putative defendant," and whether the standard should be an objective one, looking to the evidence available to the government at the time the witness is questioned, or a subjective one, looking to the actual knowledge and intent of the government at the time.

an unknown contractor and had been delivered to "A. Jenkins." On several other occasions appellants supplied Haines with false statements (Pet. App. 7-8).

Petitioners' remarks made in response to Agent Haines' questions concerning the "sale" of the Chevrolet were voluntary. Petitioners were not entitled to *Miranda* warnings prior to answering Agent Haines' questions, because petitioners were not in custody at the time. See *Miranda* v. *Arizona*, 384 U.S. 436, 477. The test for determining whether an "in custody" interrogation has taken place looks to whether under the circumstances of the questioning there was a "potential of compulsion" to answer questions. *United States* v. *Gibson*, 392 F. 2d 373 (C.A. 4); *United States* v. *Hall*, 421 F. 2d 540 (C.A. 2), certiorari denied, 397 U.S. 990. Relevant circumstances include the duration of questioning, the manner in which it was conducted, and whether there was an attempt to trick the suspect into an admission of guilt. *United States* v. *Hall, supra.* Petitioners have neither alleged nor shown that any of these circumstances prevailed when they were questioned by Agent Haines, and the record contains no indicia of compulsion.

Nor have petitioners cited any authority for the proposition that *Miranda* warnings are required prior to furnishing documents to government investigators, and we know of none. Cf. *Schneckloth* v. *Bustamonte*, 412 U.S. 218.

3. Petitioners contend that the indictment was inadequate to support their conviction for violating 18 U.S.C. 201(b)(1), which requires that the bribe in question be offered to a public official, since the indictment charged that the Chevrolet was, after an intermediate transfer to Sanchez's brother-in-law, titled to Irene Sanchez, the wife of Moses Sanchez. The record indicates, however, that the vehicle actually belonged to Sanchez. Petitioners and Sanchez merely attempted to "launder" the title by running it through Sanchez's brother-in-law to Mrs. Sanchez. Moses Sanchez testified that he

arranged to have the car titled first in his brother-in-law's name and later in his wife's name, and asked her to go to Santa Fe, New Mexico, to arrange the transfer (Tr. 505-506).[4] Sanchez's brother-in-law testified that he had no interest in the vehicle (Tr. 375, 376, 505). Furthermore, Sanchez obtained insurance on the vehicle in his own name (Tr. 506-507). 18 U.S.C. 201(b)(1) was designed to provide a remedy against such indirect bribery transactions. See *United States* v. *Jacobs*, 431 F. 2d 754, 759 (C.A. 2), certiorari denied, 402 U.S. 950; see generally, *United States* v. *Irwin*, 354 F. 2d 192, 196 (C.A. 2), certiorari denied, 383 U.S. 967. As the court of appeals noted, moreover, the fact that Irene Sanchez was named in the indictment as the recipient of the Chevrolet did not impair petitioners in preparing their defense (Pet. App. 6-7):

> * * * [T]he bribery count specifies appellants as giving the bribe, Sanchez as receiving the bribe, the SBA as employing Sanchez, the 1972 Chevrolet Blazer as the thing of value given, the cost of the Blazer as approximately $5,000, the $200,000 loan involved in the bribe, and the influencing of an official act as the reason for the bribe. The indictment follows closely 18 U.S.C. §201(b) and is correct, specific and sufficiently detailed to enable appellants to adequately prepare their defense. See *Stephens* v. *United States*, 347 F. 2d 722 (5th Cir. 1965), *cert. den'd*, 382 U.S. 932.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[4] "Tr." designates the transcript of the trial in the district court.

SUPREME COURT, U. S

FILED

JAN 16 1975

MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

October, 1974 Term

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Respondent.

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PETITION FOR REHEARING

Petitioners pray, pursuant to Supreme Court Rule 58, that the Supreme Court of the United States grant a rehearing of the Order entered by this Court on December 23, 1974, denying Petitioners' Petition for a Writ of Certiorari.

CERTIFICATE OF GOOD FAITH

I hereby certify that the within Petition for Rehearing is presented in good faith and not for delay and that the Petition is restricted to intervening circumstances of substantial or controlling effect which were unknown to Petitioners at the time of the preparation and filing of the Petition for Writ of Certiorari.

ALFRED M. CARVAJAL

QUESTION PRESENTED FOR REVIEW

WHETHER PERSONS WHO ARE IN A POSITION OF BEING "PUTATIVE" OR "VIRTUAL" DEFENDANTS ARE ENTITLED TO MIRANDA WARNINGS PRIOR TO FURNISHING STATEMENTS AND DOCUMENTS TO GOVERNMENT INVESTIGATORS AND PRIOR TO APPEARING AND TESTIFYING BEFORE A FEDERAL GRAND JURY.

REASONS RELIED ON FOR ALLOWANCE OF A PETITION FOR REHEARING

In their appeal to the Tenth Circuit Court of Appeals and in their Petition for a Writ of Certiorari, Petitioners have raised the issue of law of whether persons who are in a position of being "putative" or "virtual" defendants are entitled to Miranda Warnings prior to furnishing statements and documents to government investigators and prior to appearing and testifying before a Federal grand jury. The Petition for a Writ of Certiorari was denied on December 23, 1974.

In its memorandum in opposition to the Petition for a Writ of Certiorari, the government agreed that the various circuits are in conflict upon the issue of whether a so-called "putative defendant" is entitled to a warning of his Fifth Amendment rights prior to testifying before a grand jury. Further, the government admitted that these very issues are presently being presented to the Supreme Court by way of Petitions for Writ of Certiorari in *United States v. Rose Wong*, No. 74-635 and in *United States v. Mandujano*, No. 74-754.

In *United States v. Mandujano*, 496 F.2d 1050 (1974) the Fifth Circuit Court of Appeals upheld the trial court's determination that a person in the position of a virtual or putative defendant is entitled to full Miranda Warnings prior to testifying before a grand jury.

However, the government argued that the defendants in the present case were not "putative defendants" in the same sense as were the defendants in the above mentioned cases, and therefore, were not entitled to Miranda Warnings regardless of the Court's ultimate disposition of the above mentioned cases.

The facts and the issues in the instant case and in *U.S. v. Mandujano*, 496 F.2d 1050 (1974) are almost identical. In each case the government had considerable evidence against the defendants prior to calling the defendants to testify before the grand jury. In each case, the government emphatically denied that it had any intention of bringing charges against the defendants prior to their grand jury

appearances.

In *Mandujano*, supra, both the trial court and the Fifth Circuit Court of Appeals looked beyond the government's assertions and concluded that the "facts of the case belie the government's protestations of innocent intent with respect to the possibility of future prosecution." 496 F.2d 1050, 1055 (1974). After reviewing the facts of the case, and relying especially on the form of the questions asked of the defendant at the grand jury hearing, the Fifth Circuit Court of Appeals concluded that "it strains credulity to suggest that the special attorney did not have one eye on a possible prosecution of the defendants . . . Considering the totality of the circumstances in this case, the questioning of the Defendants before the grand jury smacks of entrapment." 496 F.2d 1050, 1053. . . . "The inference is easily drawn that the attorney questioning was primarily baiting Mandujano to commit perjury" 496 F.2d 1050, 1055.

In the instant case, the defendants were charged with bribing a small business administration official by giving him a Blazer automobile in exchange for his assistance in obtaining a loan and with perjury before the grand jury in regard to the transaction. The government admitted that the defendants were not given Miranda Warnings prior to their grand jury testimony. The record establishes that prior to calling the defendants to appear before the grand jury, the government was aware of the following facts: that the Defendants had obtained a $200,000 loan from the Small Business Administration; that a Chevrolet Blazer, formerly in the possession of the defendants, had been delivered to Moses Sanchez, a Small Business Administration official being investigated for bribery activities; and that FBI agent Haines had made several trips to the defendants' business to investigate their records (Pet. APP. 2, 3, 8). At trial, there was undisputed evidence that prior to the grand jury appearances, FBI agent Haines told witness Gomez that the defendants Robert Pommerening and Cletus A. Reding were in "hot water" (Tr. 68).

With the above information and photocopies of defendants' business records in their possession, the

government subpoenaed the defendants to appear before the grand jury, and without giving Miranda Warnings, asked Pommerening the following question which later became the basis of a perjury charge, as outlined on page two of the indictment:

> "Q. Well, let me ask you just this: is there any connection whatever between this Blazer that we have been talking about here and this two hundred thousand S.B.A. loan?"

Therefore, based upon the information available to the government and on the questions propounded to the defendants at the grand jury hearing, the Petitioners respectfully submit that, as stated by the Fifth Circuit in *Mandujano*, supra, "the facts of the case belie the government's protestations of innocent intent with respect to the possibility of future prosecution," and "it strains credulity to suggest that the special attorney did not have one eye on a possible prosecution of the defendants."

Furthermore, Petitioners respectfully submit that the record clearly shows that they were "putative" or "virtual" defendants at the time they appeared before the grand jury in the same sense as was the defendant in *Mandujano*.

Therefore, Petitioners submit that the pendency of Petitions for Writ of Certiorari in *United States v. Rose Wong*, No. 74-635 and in *United States v. Mandujano*, No. 74-754, constitutes a sufficient invervening circumstance to justify the granting of a rehearing on Petitioners' Writ of Certiorari. For in the event that the Supreme Court should hereafter hold, in the above mentioned cases, that a virtual or putative defendant is entitled to Miranda Warnings prior to testifying before a grand jury, such a holding would be of substantial and controlling effect in the determination of the rights of the defendants herein.

Wherefore, Petitioners pray that this Honorable Court either grant a separate rehearing of the Order denying their Petition for a Writ of Certiorari or, in the alternative, that this Court consolidate its consideration of the instant

Petition for Rehearing with its consideration of the Petition for a Writ of Certiorari in *Mandujano*, No. 74-754.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing was mailed to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and to the Honorable Victor R. Ortega, United States Attorney for the District of New Mexico, P.O. Box 607, Albuquerque, New Mexico 87103, this 15 day of January, 1975.

Alfred M. Carvajal

ALFRED M. CARVAJAL